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Nos. 96-821 & 96-997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE JONATHAN WOODNER CO., THE ESTATE OF JONATHAN WOODNER, AND STEVEN Z. LAUFER,

Petitioners,

v.

FRANCISCA BREEDEN, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This is a racially-charged case in which respondents' counsel, representing all-black plaintiffs against all-white defendants, struck all potential white jurors, made unfounded charges of racism against the defendants in front of the resulting all-black jury, and then induced that jury to return a substantial punitive damages award that was completely unsupported by the evidence. Because of that lack of support, the Court of Appeals set the punitive award aside. Nevertheless, that court summarily rejected our claim that under *Batson* the entire jury verdict was infected by racism and should be set aside. Worse, even though the court ordered a new trial on punitive damages, it rejected our contention that because precisely the same evidence underlies the compensatory damages claims as underlies any request for punitive damages, a retrial limited solely to punitive damages contravenes the Seventh Amendment.

Significantly, respondents' counsel does not seriously challenge that the lower courts are deeply divided over the *Batson* and Seventh Amendment questions presented by our petitions. Neither does he dispute that these two constitutional questions are frequently recurring and that their resolution is important to the fair administration of justice in the Nation's courts. Instead, respondents' counsel contends that the two questions are somehow not presented by this case. As we will show, however, his contentions are based on distortions and misrepresentations of the record, and the Court should not allow his contentions to detract from the compelling case for certiorari presented here.

I. THE COURT SHOULD RESOLVE THE CONFLICT OVER THE PROPER USE OF COMPARATIVE ANALYSIS UNDER *BATSON*

1. Respondents' principal answer to our *Batson* petition is that we are merely asking this Court to overturn the trial court's factual findings as "clearly erroneous."

See Opp. (96-821) at 11-12. That is not so. As respondents concede, "petitioners have attacked the *method* used by the District of Columbia Court of Appeals to determine whether a trial court's findings of fact are clearly erroneous." *Id.* at 12 (emphasis supplied). The central question presented here is not whether the trial court's findings are clearly erroneous, but whether the courts below applied an incorrect legal standard—which ignores the role of comparative analysis—to evaluate counsel's explanation for his apparently racially-based strikes. That is a question of law, and one that divides the lower courts and now merits this Court's review.

2. Respondents contend that the conflict in the lower courts is "irrelevant" here because the Court of Appeals purportedly applied the stringent *per se* rule of comparative analysis to petitioners' claims. *Id.* at 12-16. But respondents do not and cannot support this assertion with the Court of Appeals' decision in *this* case. Regardless of that court's conflicting decisions in *other* cases, the court clearly did *not* apply a comparative analysis to evaluate petitioners' claims in this case. *See* Pet. App. (96-821) at 6a n.5. Moreover, where, as here, there is a conflict among the decisions of various courts, the existence of an additional conflict among the decisions of a single court is a further factor supporting this Court's review. *See, e.g.*, *Scarborough* v. *United States*, 431 U.S. 563, 567 n.4 (1977); *John Hancock Mut. Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939).

3. Respondents finally argue that even if the courts below had applied a rigorous comparative analysis, the behavior of respondents' counsel would have been sustained under *Batson*. *See* Opp. (No. 96-821) at 9-11. To support this argument, respondents make two new factual assertions that they raise for the first time in their brief to this Court. First, they assert that one of the black venirepersons (No. 605) whom the trial court found to be similarly situated to the stricken whites was not really similar because she "formally withdrew" her hardship

claim. *Id.* at 2, 10. Second, respondents imply that counsel would have used his final peremptory challenge to strike the second black venireperson whom the trial court found to be similarly situated (No. 627), if only petitioners had not struck him themselves. *Id.* at 3, 9-10.

As shown below, neither of these belated assertions is supported by the record. More significantly, however, under *Batson* and its progeny counsel was required to make these kinds of assertions to the *trial court* so that court could assess their credibility contemporaneously with the challenged strikes. Here, counsel did not make either of his current assertions either to the trial court or even to the Court of Appeals. And the mere fact that it has taken counsel nearly eight years to conjure up these assertions serves to underscore that the purportedly "neutral" explanations that counsel gave at the time of his challenges were, in fact, pretextual.

Indeed, the record plainly confirms that counsel's new assertions are complete afterthoughts that cannot withstand a comparative analysis. The claim that No. 605 (who sat on the primary jury) was not similarly situated to the stricken whites because she "formally withdrew" her claim of hardship is refuted by the trial court's own findings. Comparing No. 605 to No. 642, the white female struck by counsel, the trial court noted that both gave nearly identical responses when questioned about their claims of employment hardship:

> One of the black women [No. 605] indicated to us that indeed she guessed she could make it; they could find somebody. Likewise, the white wom[a]n who was struck [No. 642] indicated that while it was a hardship, they could manage, and that [a lot] of people faced hardships.
>
> On the basis of that explanation and the data that the Court has before it, *it is hard pressed to find an explanation other than race* for selecting two women, both relatively young, both of whom first

> expressed some difficulty and then indicated they could manage.

Pet. App. (96-821) at 60a (emphasis supplied). This similarity between these two jurors, and the failure of the courts below to justify approving counsel's disparate treatment of them, is itself sufficient reason to grant certiorari to resolve the conflict on the question presented.

The record, however, also belies counsel's new-found suggestion that he would have stricken the other similarly-situated black venireperson (No. 627) identified by the trial court. First, the trial court initially proposed that *all* venirepersons who had answered "yes," to the first two questions on their questionnaires, which inquired about hardships (*see* Opp. App. (96-821) at 1a, 4a) be excused for cause, but respondents' counsel opposed that suggestion. *See* Feb. 22, 1989 Tr. (9:30 a.m.) at 118-19 (R. HH). Then, of the four venirepersons found by the trial court to have expressed similar job concerns, counsel challenged *only* the two whites for cause, specifically *opposing* petitioners' motions to remove No. 627 (whom counsel now implies he would have peremptorily challenged) as well as to remove No. 605. *Id.* at 127-28, 119-20. And even after counsel's challenges for cause were denied, counsel specifically recalled the two whites—but not the similarly-situated blacks—for further questioning and renewed his challenges for cause against them. *See* Feb. 23, 1989 Tr. (10:12 a.m.) at 10-11 (Supp. R. #5). Finally, counsel could have, but did not, strike No. 627 with his first two peremptory challenges, striking white venirepersons instead.

In the face of this record, counsel's newly-discovered rationales for his behavior are plainly untimely and in any case ring hollow. More importantly, even if those arguments had been presented to the courts below, they would not have justified counsel's disparate treatment under the rigorous comparative analysis of *prima facie* race-based strikes endorsed by courts in other jurisdic-

tions.[1] The conflict is thus squarely presented by this case and should be resolved by this Court.

II. THE COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER THE SEVENTH AMENDMENT PERMITS A PARTIAL RETRIAL LIMITED TO PUNITIVE DAMAGES

1. Respondents devote nearly the whole of their opposition in No. 96-997 to arguing that our Seventh Amendment claim is untimely and was not raised below. Neither argument is correct. They argue that we were obligated to raise the claim in a petition from the Court of Appeals' original September 14, 1995 decision, because the court's later August 8, 1996 order merely "elaborated" on its reasons for deciding the question in its earlier ruling. *See* Opp. (96-997) at 1, 6. In fact, the September 14, 1995 opinion nowhere even addressed the question. Indeed, the later August 8 order was issued in response to *respondents'* own motion, filed after the 1995 opinion, that the court authorize execution on the judgment for compensatory damages, a motion petitioners expressly opposed on the ground that such execution would contravene their Seventh Amendment rights. Thus, in the August 8 order, the court for the first time "turn[ed] to the . . . question" whether "a retrial on the sole issue of punitive damages [would] be unfair to [petitioners]." Pet. App. (96-997) at 5a. Noting that it "would ordinarily leave it to the trial court, in the first

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[1] Significantly, respondents nowhere justify the second prong in counsel's race-based strategy—his unsupported charges of racism before the all-black jury. Without identifying any record support, respondents merely state that the charges were justified by the jury's verdict on petitioners' counterclaim for libel based on a sign that was hung outside a plaintiff's window. *See* Opp. (96-821) at 11. But respondents' defense at trial was *not* that the sign spoke the "truth"; rather, respondents' *own* testimony was that the sign was directed to racism *in general*, and was not meant to charge petitioners with racism. *See* Mar. 1, 1989 (2:10 p.m.) Tr. at 53 (R. WW); Mar. 3, 1989 (10:35 a.m.) Tr. at 19-20, 24-25 (R. FFF); Mar. 6, 1989 (3:50 p.m.) Tr. at 28-29 (R. JJJ).

instance, to pass on that point," *id.*, the court nevertheless decided the question itself. *Id.* at 6a-7a. Petitioners thereafter sought review of that decision in this Court, following the Court of Appeals' denial of rehearing.

2. Respondents assert, however, that our petition for rehearing of the August 8 order did not toll the time for petitioning for certiorari from that order. This too is wrong. Under this Court's rules, "the time to file a petition for certiorari runs from the date of the judgment or order sought to be reviewed," but "if a petition for rehearing is timely filed in the lower court by any party," the time to file the petition for certiorari runs from the denial of the petition for rehearing. Sup. Ct. R. 13.3.[2]

Respondents nevertheless argue that our petition for rehearing was not authorized by the Court of Appeals' own rules. *See* Opp. (96-997) at 9-10. But they fail to inform this Court that the Court of Appeals itself rejected that very argument. On August 2, 1996, the court erroneously allowed its mandate to issue prior to its August 8 order. Petitioners then moved the court to recall that mandate pending resolution of the petition for rehearing of the August 8 order. On September 6, 1996, the court held that its mandate had been issued in error, recalled the mandate, and stayed it "pending resolution of the rehearing petition before the court." Order of September 6, 1996. Then, on September 16, the court ordered respondents to file a response to the rehearing petition, necessarily rejecting respondents' express contention that no petition for rehearing was authorized. *See* Appellees' Statement Regarding Appellants' Motion to Recall August 2, 1996 Mandate and to Stay Execution

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[2] A petitioner, of course, cannot avoid the time constraints by filing successive petitions for rehearing from the *same* judgment or order. But if, as here, a lower court elects to issue successive judgments or orders, each of which is subject to a petition for certiorari, then Rule 13.3 provides that a timely filed petition seeking rehearing of each order will toll the filing period for the petition for certiorari from that order.

at 1-2 (filed Sept. 13, 1996). The court then considered the petition on its merits, denying it over the dissent of one judge who would have granted rehearing. *See* Pet. App. (96-997) at 9a. Thus, contrary to respondents' current contentions, the Court of Appeals necessarily ruled that the petition for rehearing was proper, and that court's construction of its own rules regarding rehearing petitions should be found controlling here. *See Missouri* v. *Jenkins*, 495 U.S. 33, 50 (1992).

It is true that the Court of Appeals, by issuing two successive rulings in this case, has created an unusual procedural posture requiring two petitions raising different constitutional questions. But petitioners have timely presented those questions in full compliance with this Court's rules and should not be prejudiced by the Court of Appeals' decision to issue two separate rulings.[3]

3. Respondents next misrepresent the record by asserting that the Seventh Amendment question was not even raised below. As noted, petitioners raised that issue in response to respondents' motion requesting immediate execution on compensatory damages. Before then, there was no need for petitioners to raise the issue, because—as the court itself recognized in its August 8 order—that question would ordinarily have been left to the trial court to decide on remand. *See* Pet. App. (96-997) at 5a. Thus, petitioners opposed respondents' motion in part because "on remand in this case the trial court would have to determine as an initial matter whether a trial could fairly be limited to the issue of punitive

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[3] Respondents contend that our second petition is untimely because if we do not prevail on our *Batson* claim, "this Court . . . will be unable to provide defendants with any meaningful relief." Opp. (96-997) at 9. This contention has nothing to do with the timeliness of our petition, and is mistaken in any event. The Court of Appeals' mandate has been stayed pending resolution of the petitions for certiorari, and execution on the judgment has been stayed by a supersedeas bond. Thus, respondents cannot execute on any judgment until the proceedings in this Court are completed.

damages alone."[4] Then, after the court addressed the issue in its August 8 order, petitioners argued in their rehearing petition that "a retrial limited to punitive damages would violate the Seventh Amendment right to a jury trial where, as here, the evidence underlying the compensatory and punitive awards is overlapping."[5] Thus, the question presented by the present petition—whether the Seventh Amendment permits a partial retrial limited to punitive damages in this case—was presented to the Court of Appeals at the earliest opportunity, and was considered and decided by that court. The question is therefore properly before this Court.

4. Finally, when they reach the merits of the Seventh Amendment issue, respondents argue that the question does not involve a legal determination at all, and that the lower courts have in fact uniformly rejected our position. Respondents, once again, are wrong.

The *Gasoline Products* inquiry requires an examination of the intertwining of the evidence relating to the issues sought to be tried separately. However, as shown

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[4] Appellants' Opposition to Appellees' Emergency Motion for Issuance of Mandate to Permit Execution on Judgment for Compensatory Damages at 5 (filed Oct. 31, 1995).

[5] Appellants' Petition for Rehearing or for Rehearing En Banc of the Panel's August 8, 1996 Order at 2 (filed Aug. 22, 1996). *See also id.* at 2 (decision "departs from controlling Supreme Court precedent (*Gasoline Products*) on the important question of when the Seventh Amendment precludes a limited retrial"); *id.* at 7 ("The panel's authorization of a limited retrial and an execution on tort damages is therefore in direct conflict with the *Gasoline Products* decision and violates defendants' Seventh Amendment rights"). Petitioners also argued alternatively, in a footnote, that the Court of Appeals' decision to address the question itself rather than leave it for the trial court on remand was "puzzling," primarily because there were trial judges who were familiar with the case. *Id.* at 7 n.3. Contrary to respondents' suggestions, this footnote was plainly an alternative argument, as petitioners principally contended that the August 8 decision contravened the Seventh Amendment as a matter of law.

by this case and those cited in our petition, due to the very nature of a punitive damages request, the evidence on that question is *necessarily* intertwined with the evidence underlying liability for compensatory damages such that a partial retrial would violate the Seventh Amendment. While it may be possible to imagine a hypothetical case in which a second jury hearing only punitive damages issues would not improperly re-examine issues considered by the first,[6] neither this case nor any cited by respondents is such a case.

Respondents nevertheless contend that the circuit courts have uniformly rejected our position (*see* Opp. (96-997) at 19-20), and in doing so they completely misrepresent the very cases upon which they rely. Eleven of their seventeen cited cases, while generally remanding for a new trial on punitive damages, did not reach or discuss the Seventh Amendment issue in any way.[7] Moreover, those cases are fully consistent with our position that a party may elect not to assert its Seventh Amendment right to a retrial on all issues. The remaining cases,[8] although supporting respondents' position, merely underscore the conflict on the question presented; for those cases certainly do nothing to change the fact that other circuits have ruled the other way on the issue, in support of the Seventh Amendment claim

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[6] For example, there could theoretically be a case (unlike this one) where the first jury issued extensive special verdicts on factual issues that obviate the need for the second jury to reconsider that evidence.

[7] One case, *Brink's Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983), did not remand for a new trial at all.

[8] *Williams* v. *Armontrout*, 977 F.2d 437 (8th Cir. 1992); *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 871 F.2d 1368 (8th Cir. 1989) ("*Robertson I*"); *Smith* v. *Lightning Bolt Productions, Inc.*, 861 F.2d 363 (2d Cir. 1988); *Maxey* v. *Freightliner Corp.*, 727 F.2d 350 (5th Cir. 1984); *Grimm* v. *Leinart*, 705 F.2d 179 (6th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); *Atkinson* v. *Dixie Greyhound Lines, Inc.*, 143 F.2d 477 (5th Cir.), *cert. denied*, 323 U.S. 758 (1944). The *Smith* case was cited in our petition.

made here. When these cases are considered with those cited in our petition (at 8 n.8), four circuits (the Third, Fourth, Ninth and Tenth) hold that the Seventh Amendment precludes a partial retrial limited to punitive damages, two circuits (the Second and the Sixth) hold to the contrary, and two circuits (the Fifth and the Eighth) have issued conflicting opinions on the subject, with the later opinions from those circuits supporting our view.[9] Thus, far from demonstrating uniformity in the lower courts, the cases cited by respondents further confirm that the question is a frequently recurring one that has sharply divided the lower courts.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petitions, the petitions should be granted.

Respectfully submitted,

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[9] In *Robertson Oil Co.* v. *Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2120 (1994)—an *en banc* rehearing after remand from *Robertson I*—four judges dissented on the grounds that the earlier decision authorizing a partial new trial had "disregarded applicable law" and should be reversed in light of this Court's recent punitive damages jurisprudence. *Id.* at 392-93 (Beam, J., dissenting). The majority believed that the law of the case prevented it from reopening the prior decision (*id.* at 376 n.5), but recent circuit precedent precludes such partial retrials. *See Burke* v. *Deere & Co.*, 6 F.3d 497, 513-14 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).